UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

BARBIE SPEAR, in her capacity as trustee of the Alliance Holdings, Inc. Employee Stock Ownership Plan, and ALLIANCE HOLDINGS, INC., a Pennsylvania Corporation, in its capacity as a Named Fiduciary of the Alliance Holdings, Inc. Employee Stock Ownership Plan, AH TRANSITION CORP., a corporation, and A.H.I., INC., a corporation, Plaintiffs, v. DAVID B. FENKELL, STONEHENGE FINANCIAL HOLDINGS, INC., DBF CONSULTING LLC, STUDENT LOAN MANAGEMENT AND RESEARCH SERVICES, LLC, JOHN P. WITTEN, BARRY GOWDY, RONALD D. BROOKS, PAUL SEFCOVIC, LIANNE SEFCOVIC, KAREN FENKELL, Defendants, and BARBIE SPEAR, in her individual capacity, KENNETH WANKO, in his individual capacity, and ERIC LYNN, in his individual capacity, Third-Party Defendants.	CIVIL ACTION NO. 2:13-CV-02391-RAL

STONEHENGE DEFENDANTS' MOTION FOR RECONSIDERATION OF CERTAIN RULINGS IN THE COURT'S MEMORANDUM OF SEPTEMBER 30, 2016

TABLE OF CONTENTS

I. THE OPINION ERRONEOUSLY FAILS TO RECOGNIZE THAT ERISA GREATLY RESTRICTS LIABILITY AND AVAILABLE RELIEF AGAINST NON-FIDUCIARIES 1

A. Under ERISA, Non-Fiduciaries Can Only Be Liable For Knowingly Participating In *Prohibited Transactions (Not Fiduciary Breaches)* 1

B. Under ERISA, Non-Fiduciaries Can "Participate" In Prohibited Transactions Only By Receiving Plan Assets 2

C. Under ERISA, Relief Against A Non-Fiduciary Is Strictly Limited To "Appropriate Equitable Relief" That, Among Other Things, Requires Tracing And An Identifiable Trust *Res* 4

II. THE OPINION ERRS BY FAILING TO SEPARATELY CONSIDER THE STONEHENGE DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENTS 9

III. THE OPINION ERRS BY SUGGESTING THAT ERISA PREEMPTION DEPENDS ON WHETHER PLAINTIFFS CAN SUCCESSFULLY PROVE THEIR CLAIMS AND ON AVAILABILITY OF RELIEF UNDER ERISA 9

Stonehenge Financial Holdings, Inc. ("Stonehenge"), John P. Witten, Barry Gowdy and Ronald D. Brooks (collectively, "Stonehenge Defendants") hereby move, pursuant to Local Rule of Civil Procedure 7.1(g), for reconsideration of the Court's Memorandum of September 30, 2016 ("Opinion"):[1]

I. THE OPINION ERRONEOUSLY FAILS TO RECOGNIZE THAT ERISA GREATLY RESTRICTS LIABILITY AND AVAILABLE RELIEF AGAINST NON-FIDUCIARIES

The Court denied the Stonehenge Defendants' motion for summary judgment as to Counts IV and V on the grounds, among others, that: (1) the Stonehenge Defendants "participated" in Fenkell's fiduciary breaches as a matter of law (Op. at 57-63) and (2) if the Stonehenge Defendants are shown at trial to have participated "knowingly," the remedies of disgorgement and accounting are "appropriate equitable relief" available under ERISA Section 502(a)(3)(Op. at 65-70). Respectfully, both conclusions are manifest errors of law requiring reconsideration.

A. Under ERISA, Non-Fiduciaries Can Only Be Liable For Knowingly Participating In *Prohibited Transactions (Not Fiduciary Breaches)*

The ERISA liability of non-fiduciaries such as Stonehenge Defendants is distinct from and not coextensive with trust common law.[2] At common law, a non-fiduciary who knowingly participates in a trustee's fiduciary breach is liable to trust beneficiaries. *See,*

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[1] This Motion addresses certain of the Opinion's significant legal errors and attaches a non-exclusive chart as Exhibit A identifying multiple errors of fact pertaining to the Stonehenge Defendants.

[2] ERISA "is an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 262 (1993). As a result, important differences exist between the scope of liability under ERISA and the common law of trusts. *See, e.g., Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) ("Beyond the threshold statement of [fiduciary] responsibility . . . the analogy between ERISA fiduciary and common law trustee becomes problematic"); *Navarre v. Luna (In re Luna)*, 406 F.3d 1192, 1202 & n.8 (10th Cir. 2005) ("ERISA abounds with the language and terminology of trust law" but "[t]his is not to say that the law of trusts provides all the answers.").

e.g., *Mertens*, 508 U.S. at 262; 3 Austin W. Scott & William F. Fratcher, *Law of Trusts* § 224.1, at 404 (4th ed. 1988). Under ERISA, liability of non-fiduciaries is substantially narrower: A non-fiduciary is liable only for knowingly participating in a *prohibited transaction* – not for knowing participation in the broader "fiduciary breaches." *See, e.g.*, *Harris Trust and Savs. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000); *Nat'l Sec. Sys. v. Iola*, 700 F.3d 65, 91 (3d Cir. 2012) (quoting *Renfro v. Unisys Corp.*, 671 F.3d 314, 325 (3d Cir 2011) (ERISA "§ 502(a)(3) 'does not authorize suit against "nonfiduciaries charged solely with participating in a fiduciary breach."'") (quoting *Reich v. Compton*, 57 F.3d 270, 284 (3d Cir. 1995))).[3]

Respectfully, then, the Opinion's repeated references to the Stonehenge Defendants' non-fiduciary ERISA liability for knowing participation in "fiduciary violations," *see, e.g.*, Op. at 57, 59, 60, 64, 65, 68, rather than "prohibited transactions," is manifest error.

B. Under ERISA, Non-Fiduciaries Can "Participate" In Prohibited Transactions Only By Receiving Plan Assets

The Opinion's conclusion that receiving plan assets "is one way, but not the only way, a non-fiduciary can 'knowingly participate'" in a prohibited transaction (Op. at 59) also is manifest error. Throughout *Harris Trust*, the Supreme Court repeatedly tied ERISA liability of non-fiduciaries to the receipt of plan assets, *see* 530 U.S. at 250, 251, 253, and courts around the country have consistently held that receiving plan assets is the

[3] *See, e.g.*, *Mertens*, 508 U.S. at 262 ("ERISA has eliminated . . . the common law's joint and several liability for all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did."); *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991) (ERISA "exempts from its reach certain parties and activities that may have been amenable to suit under traditional trust law.").

touchstone of ERISA Section 502(a)(3) non-fiduciary liability. *See* Stonehenge SJ Mem. at 106-08.[4]

Principally relying upon *Iola*, the Opinion notes that "Barrett, the salesman in *Iola*, did not receive trust assets" yet was liable for knowing participation (Op. at 63). This statement fails to recognize the central distinguishing fact that Barrett's liability turned on his status as agent of his employer (Tri-Core) which was a fiduciary. *See Iola*, 700 F.3d at 82-84. In his role as a fiduciary agent (and unlike non-fiduciaries), Barrett was liable for ERISA Section 409(a) "make-whole" relief that does not require receipt of plan assets. *See, e.g.*, *Mertens*, 508 U.S. at 252. Even under the Courts reading that *Iola* provides a limited exception to the "receiving plan assets" requirement for "participation" by non-fiduciaries, that limited exception is clearly inapplicable to the Individual Defendants in this case. Mr. Brooks was an officer of and Messrs. Gowdy and Witten were acting as agents of non-fiduciary Stonehenge, not some fiduciary.

Further, the Opinion's distinguishing of *Mellon Bank* on the ground that Stonehenge was more actively involved in the Spread Transaction than the attorney in that case (Op. at 62-63), respectfully, is inaccurate: In *Mellon Bank*, the Third Circuit held that the attorney did not "participate" because he did not receive funds from the transaction (*i.e.*, he did not receive plan assets) – not because his conduct was limited in scope. *Mellon Bank. v. Levy*, 71 F. App'x 146, 149 (3d. Cir. 2003). The respective levels of involvement of the Stonehenge Defendants and the *Mellon Bank* attorney are irrelevant.[5]

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[4] The Court previously imposed the "the limit [on] the profusion of remedies under ERISA" against the Stonehenge Parties in their attempt to assert claims against third-parties and co-defendants for contribution under ERISA. (R&R at 10, 17-18 (Doc. 281.).)

[5] The Opinion's reliance on a treatise compiling the legal standards for "participation" under the common law of trusts and dictionary definitions (Op. at 62, 63 n.32) is also error because (a) as set forth in the previous section, ERISA liability for non-fiduciaries is much

Because the Stonehenge Defendants did not receive plan assets, they did not "participate" in Fenkell's alleged prohibited transactions and are entitled to judgment on Counts IV and V.

C. Under ERISA, Relief Against A Non-Fiduciary Is Strictly Limited To "Appropriate Equitable Relief" That, Among Other Things, Requires Tracing And An Identifiable Trust *Res*

Respectfully, the Opinion further errs repeatedly in failing to recognize that ERISA strictly restricts the relief available against non-fiduciaries who knowingly participate in a prohibited transaction. The Supreme Court has held that Section 502(a)(3) "appropriate equitable relief" does not authorize all relief that equity courts were empowered to award; instead, only the *equitable form* of such relief is available. *See, e.g.*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209-10 (2002). "Whether the remedy a plaintiff seeks is legal or equitable depends on (1) the basis for the plaintiff's claim and (2) the nature of the underlying remedies sought." *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Heath Benefit Plan*, 136 S. Ct. 651, 657 (2016) (internal quotations and alteration omitted). The relief's "label" (such as restitution, disgorgement or constructive trust) is not determinative; rather, this Court must carefully examine how the relief sought would operate as applied to the specific facts of the case. *See, e.g.*, *SEC v. Cavanagh*, 445 F.2d 105, 118 (2d Cir. 2006) (whether remedies were traditionally available in equity "concerns not the name used by equity courts and commentators for historical remedies but rather their specific actions and the resulting practical consequences"). Thus, the issue is not "whether disgorgement and an accounting are

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narrower than the common law and standards for participation are not identical; and (b) if a dictionary definition to "participate" under *Harris Trust* means nothing more than to "take part in an activity or event" (Op. at 62), the attorney in Mellon Bank indisputably "participated" by enabling the transaction to occur; but the Third Circuit held otherwise because he did not receive plan assets from the transaction.

appropriate equitable remedies" (Op. at 65) but whether requiring Stonehenge to disgorge AHIII payments, regardless of the label applied to the remedy, is an *equitable form* of relief. It plainly is not.

For relief to lie in equity rather than law, "the action generally must seek not to impose personal liability on the defendant" but seek to restore "money or property identified as belonging in good conscience to the plaintiff" that can "clearly be traced to particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213-14; *see also id.* (contrasting legal and equitable forms of restitution). Regardless of whether AHIII's assets constitute "plan assets," Plaintiffs cannot obtain equitable relief because, *inter alia*, (a) there is no evidence that Stonehenge Defendants segregated the funds they received from AHIII or kept them distinct from Stonehenge's other operating funds and revenue; and (b) Plaintiffs have not traced the AHIII funds to "particular funds" in the Stonehenge Defendants' possession. Plaintiffs seek what amounts to money damages from Stonehenge's general funds. *See* Stonehenge SJ Mem. at 108-110.

Respectfully, the Opinion commits four separate errors in ruling that the remedies of disgorgement and accounting may be available to Plaintiffs. *First*, the Opinion fails to recognize the Supreme Court's requirement that Plaintiffs must identify "particular funds" that can be "traced" within defendant's possession before relief can be deemed equitable.[6] Rather than follow the Supreme Court precedents of *Mertens*, *Great-West* and *Montanile*, the Opinion erroneously relies on *Iola* to read those requirements out of

[6] *See, e.g.*, *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005) (plaintiff's demand for "restitution" of insurance premiums paid for health care coverage did not constitute equitable relief because defendant was "under no obligation to segregate" premium payments and plaintiff did not allege that such funds were "segregated in a separate account"); *N.Y. Dist. Council of Carpenters Pension Fund v. Savasta*, No. 99-113621, 2005 WL 22872, at *3 (S.D.N.Y. Jan. 4, 2005) ("[P]laintiffs seek the disgorgement of fees paid to defendants for their consulting services. . . . Those fees do not constitute identifiable proceeds belonging to the Fund which are in the defendants' possession. The plaintiff cannot transform the nature of the relief sought by simply designating it as equitable relief in the form of *disgorgement of fees*.") (emphasis added).

existence, noting that "there were no traceable assets in the hands of a non-fiduciary" in *Iola* but the Third Circuit "nevertheless approved a disgorgement remedy against him." Op. at 69. Crucially, however, and not addressed in the Opinion, the parties in *Iola* had expressly "agree[d] . . . that [plaintiffs'] requested remedy is equitable in nature." 700 F.3d at 91; *see* Stonehenge SJ Reply at 18-19; 3/29/2016 Hr'g Tr. at 69:8-11. Accordingly: (a) Supreme Court precedent mandates summary judgement in favor of the Stonehenge Defendants on Courts IV and V because Plaintiffs have failed their Section 502(a)(3) burden of identifying "particular funds" that can be "traced" in the possession of the Stonehenge Defendants; and (b) it is manifest error to hang the *Iola* parties' agreement around the Stonehenge Defendants' neck, who made no such agreement.

Second, the Opinion errs in reasoning that the remedy of disgorgement is distinct from the equitable remedies of restitution, constructive trust and equitable lien. *See*, *e.g.*, Op. at 65 (suggesting restitution and disgorgement are distinct), *id*. at 69-70 (distinguishing *Montanile* as addressing equitable liens rather than disgorgement). As the Second Circuit noted in *Cavanagh*, "equity courts have traditionally awarded analogous forms of relief under a variety of names" – one equity court "compelled 'restitution' of wrongly gained assets while another ordered 'disgorgement' and a third held that cheating trustees must 'make good the trust' from which they stole" yet the remedies were identical for each. 445 F.3d at 118. These four remedies are often used interchangeably and, despite being measured differently (Op. at 68), connote the same type of relief. *See*, *e.g.*, *Cavanagh*, 445 F.3d at 119 ("That the term '*disgorgement*' has entered common legal parlance only recently cannot obscure that the ancient remedies of *accounting*, *constructive trust*, and *restitution* have compelled wrongdoers to *disgorge* – *i.e.*, account for and surrender – their ill-gotten gains for centuries.") (emphasis added). They are flip sides of the same coin: A constructive trust or equitable lien is the mechanism by which a court can order disgorgement or restitution of specific assets. *See, e.g.*, *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 702 (S.D. Tex. 2002) ("Restitutionary remedies in equity . . . included constructive trust and accounting for profits *as mechanisms to accomplish disgorgement* or restoration to rectify unjust enrichment.") (emphasis added). Plaintiffs cannot avoid the requirements for equitable relief, including the need to trace and identify particular funds in Stonehenge Defendants' possession, by labeling a remedy "disgorgement" or "accounting for profits" rather than "restitution."

Third, the Opinion errs by holding that the accounting for profits remedy permits Plaintiffs to avoid identifying a traceable and identifiable *res*. Accounting for profits, like other remedies, has both a legal and equitable form. *See, e.g.*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478-80 (1962) (discussing legal and equitable forms of accounting); *Skretvedt v. E.I. DuPont de Nemours*, 372 F.3d 192, 212 n.26 (3d Cir. 2004) ("*Dairy Queen* appears to cast some doubt on the purely equitable nature of the accounting for profits remedy."). The Supreme Court and the Third Circuit have each expressly held that the accounting for profits remedy is available in equity only when a plaintiff seeks profits earned by a defendant *on property to which a constructive trust has attached*. *See Great-West*, 534 U.S. at 214 n.2; *Unisys Corp. Retiree Med. Benefit ERISA Litig. v. Unisys Corp.*, 579 F.3d 220, 238 (3d. Cir. 2009); *see also* Dobbs, *Law of Remedies* § 4.3(1) (2d ed. 1993) ("Accounting for profits carries the constructive trust idea over to cases in which the *property subject to a constructive trust* produces profits or income.") (emphasis added).[7] Although "profits" need not be subject to a constructive trust itself

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[7] The Opinion's reliance on *dicta* in *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406 (3d Cir. 2013), Op. at 66, to hold the contrary is misplaced, because (1) *Edmonson* only addressed an ERISA plaintiff's statutory standing, not the scope of relief available under Section 502(a)(3), *see* 725 F.3d at 419-20; and (2) the Opinion's interpretation of *Edmonson* directly conflicts with the Supreme Court's decision in *Great-West* and the earlier unanimous Third Circuit precedential decision in *Unisys*, both of which squarely addressed the issue and reached the opposite holding.

(which courts have said is an exception to the general requirement), profits must nonetheless derive from or be generated by *other property or funds subject to a constructive trust*. Here, the Stonehenge Defendants are entitled to summary judgment on Counts V and VI because neither Plaintiffs (nor the Opinion) identifies any property or funds over which a constructive trust could attach or with which the alleged "profits" are associated. Plaintiffs do not seek "profits" generated by property rightfully belonging to them – instead, they seek the return of fees that Plaintiffs contend Stonehenge wrongfully earned, which is not equitable relief. *See* Stonehenge Reply SJ Mem. at 36-41.

Fourth, the Opinion errs by conflating the need for an identifiable and traceable *res* with the wholly separate issue of whether relief is available after a *res* is dissipated. *See*, *e.g.*, Op. at 65, 67-68 n.38. As the Supreme Court noted in *Montanile,* a plaintiff may seek equitable restitution or disgorgement of funds from a dissipated *res* only if the spent funds can be traced to specific assets. *See* 136 S. Ct. at 662 (remanding case to determine whether funds were fully dissipated on *non*traceable assets, in which case no relief would available). Although the absence of an ongoing *res* does not necessarily mean that equitable relief is not available, the ability of a plaintiff to trace funds from a dissipated *res* does not obviate the need for plaintiff to identify particular and traceable funds subject to a constructive trust or equitable lien in the first instance. Because Plaintiffs do not seek the restoration of "particular funds" in the Stonehenge Defendants' possession that can "clearly be traced" to the Spread Transaction, *Great-West*, 534 U.S. at 213-14, Counts IV and V do not seek "equitable relief" under Section 502(a)(3).[8]

See Third Circuit Internal Operating Procedures § 9.1 ("[T]he holding of a panel in a precedential opinion is binding on subsequent panels.").

[8] The Opinion also errs in failing to conclude that Stonehenge was not paid with plan assets. *See* Stonehenge SJ Mem. at 81-104; Stonehenge SJ Reply at 20-36.

II. THE OPINION ERRS BY FAILING TO SEPARATELY CONSIDER THE STONEHENGE DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENTS

The Opinion rejects the Stonehenge Defendants' numerous statute of limitation arguments, concluding that issues of fact precluded summary judgment "[f]or reasons . . . explained in Section II of this opinion dealing, with Fenkell's statute of limitations arguments." Op. at 105. In so doing, however, the Opinion errs by failing to separately consider the Stonehenge Defendants' position with respect to the "fraudulent concealment" prong of ERISA's statute of limitations.

Plaintiffs are required to establish fraudulent concealment against each defendant separately. *See, e.g., Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995) ("Plaintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statute of limitations against other defendants.") (internal quotation and supporting citations omitted); *Harris v. Koenig*, 722 F. Supp. 2d 44, 61 (D.D.C. 2010) (ERISA's "statute of limitations is not tolled as to those Individual Defendants not alleged to have participated in the acts of fraud or concealment"). The Opinion, however, seemingly lumps Fenkell's alleged fraudulent concealment and charges it to the Stonehenge Defendants. *See* Op. at 39-41. Thus, the Opinion errs in not considering (and accepting) the Stonehenge Defendants' arguments that they did not engage in any fraudulent concealment. *See* Stonehenge SJ Reply 56-61 (demonstrating lack of evidence of fraudulent concealment by the Stonehenge Defendants).

III. THE OPINION ERRS BY SUGGESTING THAT ERISA PREEMPTION DEPENDS ON WHETHER PLAINTIFFS CAN SUCCESSFULLY PROVE THEIR CLAIMS AND ON AVAILABILITY OF RELIEF UNDER ERISA

The Opinion suggests that whether Plaintiffs' state law aiding and abetting claim against the Stonehenge Defendants (Count XII) is preempted turns on (1) "[i]f Alliance succeeds in proving its ERISA claim" and/or (2) "whether ERISA Section 502(a)(3) provides a remedy." Op. at 113 n.67. Respectfully, both statements are errors of law. ERISA possesses "extraordinary pre-emptive power," *Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987), that occupies the entire field of employee benefit plans, regardless of whether Plaintiffs can ultimately succeed on their claims. *See, e.g., Levine v. United Healthcare Corp.*, 402 F.3d 156, 162 (3d Cir. 2005). Moreover, the availability of a viable remedy under Section 502(a)(3) is irrelevant to preemption: "[W]here a state law claim against a non-ERISA fiduciary 'relates to' an employee benefit plan, the lack of an ERISA remedy does not affect the preemption analysis." *Nagy v. De Wese*, 705 F. Supp. 2d 456, 464 & n.13 (E.D. Pa. 2010) (Yohn, J.) (collecting cases). "Congress intended pre-emption to apply even where no ERISA fiduciary remedy existed." *Consolidated Beef Indus., Inc. v. N.Y. Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991) (finding state law claims against non-fiduciary were preempted). Therefore, ERISA preempts Count XII (and judgment entered in favor of the Stonehenge Defendants) of the FAC regardless of whether Plaintiffs ultimately prevail on, or the availability of relief in connection with, their ERISA claims (Counts IV and V).

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Dated: October 28, 2016

Attorneys for Stonehenge Financial Holdings, Inc., John P. Witten, Barry Gowdy and Ronald D. Brooks

CERTIFICATE OF SERVICE

I, John S. Summers, hereby certify that on October 28, 2016, I caused a true and correct copy of the foregoing Stonehenge Defendants' Motion for Reconsideration of Certain Rulings in the Court's Memorandum of September 30, 2016, to be served via CM/ECF filing upon counsel for all parties.

By: *_/s/ John S. Summers_*
John S. Summers

EXHIBIT A

Respectfully, in addition to the significant legal errors identified in the Motion, the Opinion contains numerous erroneous factual statements that either (a) fail to cite any record evidence in support, (b) purport to cite record evidence in support but the cited evidence does not, in fact, support the statement, or (c) cite to record evidence as support but fail to recognize or address substantial record evidence that supports the opposite conclusion.

In addition, the Opinion concludes that Mr. Fenkell committed certain violation of ERISA Section 406 as a matter of law on the ground that he failed to prove, by clear and convincing evidence, that no ERISA prohibited transaction occurred with respect to the DBF Consulting fees. As non-fiduciaries, the Stonehenge Defendants bear no such burden and the record contains genuine disputes of material fact concerning the DBF Consulting Agreement. As a result, the Opinion's factual findings made as a result of Mr. Fenkell's failure to satisfy a heightened evidentiary burden should have no bearing against, or applicability to, the Stonehenge Defendants. Nevertheless, because many of the Opinion's statements do not accurately characterize the facts and Stonehenge Defendants' understandings, we highlight below examples of such erroneous statements.

Statements For Which No Supporting Record Evidence Is Cited

Erroneous Statement	**Record Evidence**
"Stonehenge is not an ordinary business vendor who wandered into a transaction involving trust assets without the first hint of what it was getting into. Stonehenge participated in the creation and servicing of the ESOP funding transaction. It was well versed in the nuances and hazards of dealing with an ERISA fiduciary." Op. at 90.	The Opinion does not cite any record evidence in support of this statement and, in fact, no record evidence supporting this statement exists. Plaintiffs did not present any evidence concerning the Stonehenge Defendants' understanding of ESOPs or ERISA or experiences with an ERISA fiduciary – let alone evidence showing that the Stonehenge Defendants were "well versed in the nuance and hazards of dealing with an ERISA fiduciary." By way of example, at deposition Plaintiffs did not question Ronald Brooks, Barry Gowdy, Stonehenge CEO David Meuse, Stonehenge General Counsel Jim Henson, or any principal of Stonehenge about their experience with ERISA, understanding of ERISA, or the extent to which they relied upon outside counsel for ERISA guidance concerning the Spread Transaction. Plaintiffs did question Mr. Witten about his experience and background with ERISA. Mr. Witten testified [redacted] Ex. 2, Stonehenge 30(b)(6) Dep. 25:24-26:7.[9]

[9] Exhibits referenced here were included with the Stonehenge Defendants' summary judgment filings.

Erroneous Statement	Record Evidence
"AH III used the loan money to purchase participation interests in a $900 million pool of auto loan receivables *designed by Bank One*." Op. at 12 (emphasis supplied).	The Opinion does not cite any record evidence in support of this statement and, in fact, no record evidence supporting this statement exists. Stonehenge, not Bank One, designed the receivables pool. The undisputed record evidence shows that Stonehenge, working with Bank One, identified, secured, and structured the new asset pool, including evaluating the credit, payment, diversification term, yield, and other characteristics of the pool, calculating and forecasting the expected cash flow yield on the assets, and developing procedures, protocols, and criteria for assets in the pool and selecting, managing, servicing, replacing and monitoring the assets in the pool. Stonehenge SJ Mem. at 56-57 ¶ 212(c)-(d); Ex. 83, Stonehenge's Supp. Resp. to Interrogatory 7 at 8-11. In addition, the "loan" was used by the ESOP to purchase the stock of Alliance Holdings in 1996, not to invest in a pool of assets. The undisputed record evidence shows that the investment in the participation interests in a pool of assets was made with the liquidation of AHIII's LLC interests. Stonehenge SJ Mem. at 22 ¶ 81(e)-(f); Ex. 75, Grien Rep. ¶ 69; Ex. 12, Sept. 1, 1999 Closing Binder at SQUIRE_SH_00001725-29, 1521-538.
"*The Bank itself* ensured that the assets securing the loan were maintained in prime condition." Op. at 26 (emphasis supplied).	The Opinion does not cite any record evidence in support of this statement and, in fact, no record evidence supporting this statement exists. Stonehenge, not Finance One, ensured that the assets were maintained in prime condition. The undisputed record evidence shows that Stonehenge, working with Bank One, identified, secured and structured the new asset pool and monitored the Bank and receivables to assure the replenishment of receivables that failed to meet the criteria Stonehenge had worked to establish. Stonehenge Mem. at 57 ¶ 212(d); Ex. 83, Stonehenge's Supp. Resp. to Interrogatory 7 at 10.
"The payments by AH III, in three separate tranches, one to the ESOP, one to Alliance, and one to Stonehenge, were *mutually dependent*." Op. at 26 (emphasis supplied).	The Opinion does not cite any record evidence in support of this statement and, in fact, no record evidence supporting this statement exists. AHIII's payments to Alliance were not in any way "mutually dependent" on payments to Stonehenge. The undisputed record evidence shows that AHIII's payments to repay the loan and to Alliance Holdings were not dependent on payment to Stonehenge. If the revenue generated by the Participation interests was insufficient to make the loan payment or to pay Alliance its full share, Stonehenge would be paid nothing. Stonehenge was not paid its fee until all other parties had been compensated in full. *See* Stonehenge SJ Mem. at 23 ¶ 83; Ex. 75 Grien Rep. ¶¶ 127, 129; Ex. 83, Stonehenge's Supp. Resp. to Interrogatory 7 at 11-12

Statements Where The Evidence Cited Does Not Support The Proposition

Erroneous Statement	Record Evidence
"Defendants Ronald Brooks, Barry Gowdy, and John Witten were employed in various roles for Stonehenge." Op. at 106. "Gowdy worked in numerous roles for Stonehenge related to accounting, tax and other financial reporting aspects of the company. *See* [Stonehenge Mem.] at 8." Op. at 106. "Witten served as a senior vice president and general counsel in various Stonehenge iterations. *See* [Stonehenge Mem.] at 7." Op. at 106.	To the extent the Opinion uses the word "employed" to mean "an employee of", although the Opinion cites to the Stonehenge SJ Memorandum nothing in the Memorandum supports these statements. Neither Mr. Brooks, Mr. Gowdy or Mr. Witten were ever employees of Stonehenge. Mr. Brooks was an owner of Stonehenge but not an employee. Stonehenge SJ Mem. at 6 ¶ 11; Ex. 11, Brooks Resume. Mr. Gowdy was never employed by Stonehenge. The undisputed record evidence shows that he worked in accounting, tax and other financial reporting roles for Stonehenge Capital Corporation (a subsidiary of Stonehenge) and Stonehenge Capital Company LLC (an entity that, despite the name, was not a subsidiary or affiliate of Stonehenge). Stonehenge SJ Mem. at 7-8, ¶ 21-22; Ex. 16, Gowdy Resume. Mr. Witten was never employed by Stonehenge. The undisputed record evidence shows that he acted was senior vice president and general counsel for Stonehenge Capital Corporation (a subsidiary of Stonehenge) and Stonehenge Capital Company LLC (an entity that, despite the name, was not a subsidiary or affiliate of Stonehenge). Stonehenge SJ Mem. at 7 ¶ 17-18; Ex. 15, Witten Resume. Neither Stonehenge Capital Corporation nor Stonehenge Capital Company LLC is a party to this lawsuit.
"The internal investigation was more than adequate: it was exhaustive. *Id.* [Pls. Mem. at 127.]" Op. at 49.	Although the Opinion cites to Plaintiffs' Memorandum, no record evidence supports this statement. Not even Plaintiffs' Memorandum characterizes Alliance's internal investigation as "exhaustive;" instead, Plaintiffs state only that they conducted an investigation. Pls. SJ Mem. at 127 ("the record reflects that Alliance retained Ballard Spahr LLP to conduct an investigation into Fenkell's misconduct"); *id.* at 3, 38, 55, 109 128. Moreover, the Stonehenge Defendants were not able to explore the scope and extent of the investigation in discovery. Plaintiffs have repeatedly objected to Defendants' efforts to explore the investigation on grounds of privilege.

Erroneous Statement	Record Evidence
"Kenneth Wanko, at his deposition, stated that he never represented prior to November or December 2012 that Alliance Holding's assets or AH III's assets were plan assets (*see* [Stonehenge Mem.] at 93 (citing Alliance Holdings 30(b)(6) Dep. 348:18-349:6)". . . "[but he] never said that other plaintiffs thought the same thing. *See* Alliance Holdings 30(b)(6) Dep. 349:7-349:13." Op. at 100 & n.63.	This statement misstates Mr. Wanko's deposition testimony. Testifying as Alliance's 30(b)(6) designee, Mr. Wanko testified that [redacted] Ex. 120, Alliance Holdings 30(b)(6) at 348:12-349:6. He further testified that [redacted]. *Id.* at 349:7-350:10. In addition, Alliance Holdings made judicially binding admissions that no plaintiff ever represented that Alliance Holdings' or AH III's assets were plan assets. *See* Dkt. 479 at 2 ¶ 4 ("The Alliance Parties admit they are not aware of any instance prior to August 31, 2011 in which David B. Fenkell, as Trustee of the ESOP, or anyone else in a position of control of the Plan represented to anyone that Alliance's assets were assets of the Plan."); Ex. 114, Alliance Parties' Responses to Stonehenge's Second Set of RFAs, Response No. 129 [redacted]; *id.* at 18-19, No. 143 [redacted] *id.* at 18, No. 139 [redacted]. Thus, contrary to the suggestion contained in footnote 63 of the Opinion, it is undisputed that no Plaintiff (or any other party) ever represented that the assets of Alliance Holdings or AHIII were plan assets.

Statements Where Substantial Record Evidence Contradicts The Proposition

Erroneous Statement	Record Evidence
"The deal made the parties a total of $115.4 million. *See* 4/17/2015 Deposition of Kenneth J. Wanko ("Wanko Dep.") at 297." Op. at 12.	The undisputed record evidence shows that the 1999 Spread Transaction generated $161.9 million in tax-related benefits for the parties, of which Alliance Holdings received $77.3 million. Stonehenge SJ Mem. at 26 ¶ 96; Ex. 75, Grien Report ¶ 135, Table 2, Ex. 3-A. Mr. Wanko did testify that the 1999 Spread Transaction made the parties a total of $115.4 million, as cited by the Opinion; however, he admitted that this number did not account for tax benefits obtained by Alliance Holdings, Stonehenge SJ Mem. at 54-55 ¶ 203; Ex. 120, Alliance Holdings 30(b)(6) Dep. 323:20-24, which the Court recognized as one of the "substantial" tax benefits of the transaction. *See* Op. at 9.

Erroneous Statements About Payments To DBF Consulting

Erroneous Statement	Record Evidence
"The [DBF] fees were payable to DBF after Stonehenge received its annual fee from AH III for services rendered in connection with the ESOP funding transaction. *See* 12/18/2014 Witten Dep. at 199-200." Op. at 29.	This statement is factually incorrect and Mr. Witten's cited testimony actually contradicts, rather than supports, this statement. There is no record support for the proposition that the fees to DBF Consulting were not due until after Stonehenge was paid for its services on the Spread Transaction. To the contrary, the uncontested record evidence shows that the DBF Consulting fees were paid pursuant to monthly invoices sent by Alliance Holdings' controllers to Stonehenge. *See* Stonehenge SJ Mem. at 69 ¶ 252(c); Ex. 177, Compendium of DBF Consulting Invoices, Ex. 178, Invoices for Sept. 2010 through July 2011; Ex. 179, DBF Consulting Invoices for Aug. 2010 through Sept. 2010; Ex. 180, DBF Consulting Invoices for the period Jan. 2009 through July 2010; Ex. 181, DBF Consulting Invoices for Oct. 2006; Ex. 182, DBF Consulting Invoices for the period between Jan. 2004 through Dec. 2007; Ex. 195, DBF Consulting Invoices for the period Sept. 1999 through Jan. 2005. Moreover, Stonehenge was obligated to pay the DBF Consulting fees regardless of whether it received any of its fee from AHIII. *See* Ex. 2, Stonehenge 30(b)(6) Dep. 201:12-202:20 [redacted] Thus, there is nothing in Mr. Witten's deposition testimony that supports the Opinion's statement about the purported connection between the Spread Transaction and the DBF consulting payments.
"I treat as undisputed that 1) the DBF arrangement with Stonehenge's principals preceded the 1999 ESOP funding arrangement, but was modified in light of the 1999 transaction…" Op. at 31. "[T]here is no disputing the fact that the DBF fees were negotiated in connection with, in light of, and in consideration of the Stonehenge fees	To the extent the Opinion's statements connote that prior to August 2006 the DBF fees were negotiated in connection with, in light of, and in consideration of the Stonehenge fees from the Spread Transaction, it is erroneous. The Stonehenge Defendants, who bear no evidentiary burden to disprove a prohibited transaction by clear and convincing evidence, strongly dispute these statements. They are not supported by the record evidence, or the evidence expected to be presented at trial. Numerous Stonehenge witnesses testified that the DBF Consulting Agreement was unrelated to the 1999 Spread Transaction. *See* Ex. 2, Stonehenge 30(b)(6) Dep. 227:20-229:4 [redacted]

Erroneous Statement	Record Evidence
from the ESOP funding transaction." Op. at 31. "The crucial fact is that closing this deal [between the ESOP, Alliance, and AH III, on one side, and Stonehenge on the other], triggered an enormous fee payable to him from Stonehenge...." Op. at 33. "The fees to DBF were a direct consequence, and in consideration of, the ESOP Loan Transaction." Op. at 35. "The fees paid to DBF were 'receive[d] in consideration of the loan deal." Op. at 39. Repeated references to the fees paid to DBF Consulting as "kickbacks." Op. at 20, 31, 32, 36, 38.	[redacted] Ex. 5, Henson Dep. 79:22-80:9 [redacted] Further, it is undisputed that the DBF Consulting Agreement commenced in 1998, in connection with Bank One's preferred stock investment in Alliance Holdings, which is more than two years after the Spread Transaction commenced. Stonehenge executed a new 1999 DBF Consulting Agreement in 1999 in connection with Stonehenge's departure with Bank One.
"Fenkell consistently told anyone who asked that the DBF relationship had nothing to do with Alliance and the ESOP. 12/18/14 Witten Dep. at 211." Op. at 30.	Mr. Witten's cited deposition testimony does not support this statement and other portions of his testimony squarely contradicts this statement. In the testimony cited in the Opinion, Mr. Witten explained that the DBF Consulting Agreement was not included in the 1999 Spread Transaction closing binder [redacted] Ex. 2, Stonehenge 30(b)(6) Dep. 211:4-24. In addition, there is no evidence that after 2006, when Mr. Fenkell and Alliance requested that Stonehenge reimburse DBF Consulting for payroll option contracts, that Mr. Fenkell "consistently" told anyone that the DBF Consulting fees had nothing to do with Alliance. To the contrary, there are numerous communications after 2006 which include Mr. Fenkell and Ms. Spear, in which Alliance Holdings employees sent Stonehenge spreadsheets crediting payments to DBF Consulting "to Alliance." *See* Stonehenge SJ Reply at 63-64; Ex. 176, July 23, 2009 Email from Ms. Shaw to Mr. Gowdy [redacted] Ex. 226, June 18, 2008 Email from Mr. Gowdy to Ms.

Erroneous Statement	Record Evidence
	Rose [redacted]; Ex. 206, June 12, 2008 Email from Ms. Spear to Mr. Fenkell [redacted].
"There is little doubt that [Fenkell] regularly assured personnel at Alliance that [DBF had nothing to do with the ESOP Loan Transaction]. *See* 2/25/2015 Spear Dep. at 150." Op. at 39.	Ms. Spear's cited deposition testimony does not support this statement. Instead, Ms. Spear testified to only a single conversation with Mr. Fenkell on the subject. Moreover, the written record evidence raises ample doubt about the accuracy of the statement in the Opinion. There are numerous communications after 2006, when Mr. Fenkell and Alliance requested that Stonehenge reimburse DBF Consulting for payroll option contracts, which include Mr. Fenkell and Ms. Spear, in which Alliance Holdings employees sent Stonehenge spreadsheets crediting payments to DBF Consulting "to Alliance." *See* Stonehenge SJ Reply at 63-64; Ex. 176, July 23, 2009 Email from Ms. Shaw to Mr. Gowdy [redacted]; Ex. 225, June 19, 2008 Email from Ms. Rose to Mr. Fenkell [redacted]; Ex. 226, June 18, 2008 Email from Mr. Gowdy to Ms. Rose [redacted]; Ex. 206, June 12, 2008 Email from Ms. Spear to Mr. Fenkell [redacted] This written contemporaneous evidence strongly contradicts any view that Alliance employees were regularly informed that the DBF Consulting agreement and the Spread Transaction were not related.